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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

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THE PEOPLE,

Plaintiff and Respondent,

v.

SEAN MICHAEL LAUFER,

Defendant and Appellant.

C068110

(Super. Ct. No. 10F06278)

Defendant Sean Michael Laufer was found guilty by a jury of simple assault<sup>1</sup> (count one), battery with infliction of serious bodily injury (count two) and simple battery (count three). He was sentenced to prison for three years and the court imposed various fees and fines.

On appeal, defendant contends his conviction for simple assault must be reversed, because this crime is a lesser included offense of battery with the infliction of serious

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<sup>1</sup> The assault conviction was based upon its being a lesser included offense of the charge of assault with a deadly weapon.

bodily injury, the crime of which he was convicted. The People agree.

Defendant also contends the court erred in imposing jail booking and classification fees, because there was no finding, nor evidence to support a finding, he had the ability to pay. The People respond that his argument on this point is forfeited. We shall reverse and discuss defendant's conviction in count one and otherwise affirm the judgment.

#### BACKGROUND

The victim on counts one and two, Jesse Johnston, attempted to intervene in a bar when he saw and overheard defendant arguing with a woman: defendant grabbed the woman's arm, said "[w]e're leaving," and started trying to drag her away. In response, defendant hit Johnston in the left eye. Johnston suffered cuts above and below his eye and required surgery.<sup>2</sup> A few minutes later, defendant pushed the woman with whom he had been arguing, and she fell into a window and broke it.

Defendant was charged with assaulting Johnston with a deadly weapon, a beer bottle (count one) and with committing battery, resulting in the infliction of serious bodily injury (count two). He was also charged with misdemeanor battery against the woman whom he pushed into the window (count three).

On count one, the jury acquitted defendant of the charge of assault with a deadly weapon, but found him guilty of the lesser

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<sup>2</sup> Johnston did not see anything in defendant's hand, but a broken beer bottle was later found on the floor nearby.

included offense of simple assault. It found him guilty of the charges alleged in counts two and three.

## DISCUSSION

### I

#### *The Conviction In Count One Must Be Stricken*

A defendant may not legally be convicted of both a greater offense and an offense necessarily included therein based upon the same conduct. (*People v. Pearson* (1986) 42 Cal.3d 351, 355.) However, multiple convictions may not be based upon necessarily included offenses. (*People v. Ortega* (1998) 19 Cal.4th 686, 692.) When a defendant is so convicted, the lesser included offense must be reversed and dismissed. (*People v. Miranda* (1967) 254 Cal.App.2d 517, 525; see *People v. Medina* (2007) 41 Cal.4th 685, 702.)

Assault is a lesser included offense of a completed battery. (*People v. Yeats* (1977) 66 Cal.App.3d 874, 878; *People v. Ausbie* (2004) 123 Cal.App.4th 855, 860, fn. 2.) We agree with the parties that because the battery and the assault convictions were both based upon defendant's assault on Johnston, the latter conviction must be reversed and dismissed.

### II

#### *Claims Of Error In The Imposition Of Jail Booking*

#### *And Classification Fees Are Forfeited*

At sentencing, the trial court ordered defendant to pay (among other fines and fees) a main jail booking fee of \$287.78, and a main jail classification fee of \$59.23. Defendant contends there is insufficient evidence to support a finding

that he had the ability to pay jail booking and classification fees, so those fees should be stricken.

Under Government Code section 29550.2, subdivision (a), "Any person booked into a county jail pursuant to any arrest . . . is subject to a criminal justice administration fee for administration costs incurred in conjunction with the arresting and booking if the person is convicted of any criminal offense relating to the arrest and booking. The fee which the county is entitled to recover pursuant to this subdivision shall not exceed the actual administrative costs, as defined in subdivision (c) . . . . If the person has the ability to pay, a judgment of conviction shall contain an order for payment of the amount of the criminal justice administration fee by the convicted person, and execution shall be issued on the order in the same manner as a judgment in a civil action . . . ."

Subdivision (c) of the same section authorizes fees for booking and classification while in jail.

Defendant claims that since the statute is predicated on a defendant's ability to pay and there was no evidence before the trial court that he had such ability, the fees were improperly imposed. The People respond that defendant forfeited this issue by not objecting in the trial court to payment of the jail fees.

We agree with the People. This court has previously held that if a defendant does not object in the trial court to the imposition of a fee or fine, the issue is forfeited. (*People v. Crittle* (2007) 154 Cal.App.4th 368, 371 [crime prevention fine -- Pen. Code, § 1202.5, subd. (a)]; *People v. Hodges* (1999)

70 Cal.App.4th 1348, 1357 [jail booking fee -- Gov. Code, § 29550.2]; *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1467, 1468-1469 [restitution fine -- Gov. Code, former § 13967, subd. (a).] We have applied the forfeiture rule even when the defendant claims on appeal that there is not sufficient evidence to support the imposition of the fine or fee. (*Gibson*, at pp. 1467-1469.)

The Sixth Appellate District, however, has concluded that appeals challenging the imposition of fines and fees based on claims of insufficient evidence "do not require assertion in the court below to be preserved on appeal." (*People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1397, citing *People v. Viray* (2005) 134 Cal.App.4th 1186, 1217.) This holding created a conflict between *Pacheco* and the cases cited above. The California Supreme Court has agreed to resolve the conflict. (See *People v. McCullough* (2011) 193 Cal.App.4th 864, review granted on June 29, 2011, S192513.)

Until the California Supreme Court issues further guidance, we continue to adhere to our holding in *Gibson*, i.e., that a failure to object to a fee or fine in the trial court forfeits the issue, even where the statute contemplates a judicial finding of ability to pay and the defendant challenges the sufficiency of the evidence to support such a finding. (*People v. Gibson*, *supra*, 27 Cal.App.4th at pp. 1467, 1468-1469.) "As a matter of fairness to the trial court, a defendant should not be permitted to assert for the first time on appeal a procedural defect in imposition of a restitution fine, i.e., the trial

court's alleged failure to consider defendant's ability to pay the fine. [Citation.] Rather, a defendant must make a timely objection in the trial court in order to give that court an opportunity to correct the error; failure to object should preclude reversal of the order on appeal." (*Id.* at p. 1468.) Not applying forfeiture principles in such cases not only encourages attorney gamesmanship, but depletes judicial resources and wastes taxpayer money. (See *id.* at pp. 1468-1469.)

Accordingly, we conclude that defendant's failure to raise the issue of his ability to pay the main jail classification fee and main jail booking fee in the trial court precludes review for the first time on appeal.

DISPOSITION

The conviction for simple assault in count one is reversed and dismissed. As modified, the judgment is affirmed.

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ROBIE, J.

We concur:

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HULL, Acting P. J.

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MURRAY, J.